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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, STEPHEN T. GAGE, individually and as Trustee, and UNION TRUST COMPANY OF NEW YORK, individually and as Trustee,

Defendants and Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

No. 2754.

Brief for Union Trust Company of N. Y.,

Defendant and Appellant.

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DISPATCH PRESS, Inc., NEW YORK

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This is an appeal by the defendant, Union Trust Company of New York, and other defendants, from the decree entered in alleged pursuance of the mandate of the Supreme Court filed in the District Court, December 8th, 1915.

This appellant complains that the decree as filed does not conform in several vital particulars to the mandate of the Supreme Court, and is in other particulars unauthorized.

POINT I.

The District Court had no authority to enter a decree except in conformity to the mandate.

The rule applicable is laid down in the early case of *Sibbald* v. *United States* (12 Pet. 488), in these words:

> "When the Supreme Court have executed their power in a cause before them and their final decree or judgment requires some further act to be done, it

> cannot issue an execution but shall send a special mandate to the court below to award it (24 Sec. Judiciary Act, 1 U. S. Stat. 85). Whatever was before the court and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, nor review it upon any matter decided on appeal for error apparent, nor intermeddle with it, further than to settle so much as has been remanded."

These words have been cited with approval and the rule thus stated must be regarded as conclusively established. (*Re Sanford, Fork & T. Co.*, 160 U. S. 247; *Ex parte Union Steamboat Co.*, 178 U. S. 317; *Ex parte Fuller*, 182 U. S 568.)

In the present case there is no mandate prescribing the form of decree. The language of the mandate is "that this cause be and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court (p. 7)." The opinion, while not prescribing the form of the decree, does specify with particular care the provisions which it shall contain. After the inquiry, "What shall be the judgment?", the Supreme Court proceeds as follows:

> "*A reversal of the decree of the District Court, of course, and clearly an injunction against further violation of the covenants*" (p. 156).

Then inquiring what further relief shall be granted, the Court, after examining the bill of complaint and the relief there asked for, and finding that it is limited to lands unsold, directs that the decree shall contain a reservation as follows:

> "*Therefore, the decree in this suit shall be without prejudice to any other suits, rights or remedies*

which the Government may have by law or under the joint resolution of April 30, 1908 (Res. 18; 35 Stat. 571) *or under the Act of Congress passed August 20, 1912* (Ch. 311; 37 Stat. 320)."

Then, still inquiring respecting additional relief, the Court briefly refers to the testimony respecting the character of the lands, and their suitableness for sale to an actual settler, and the changed conditions which have arisen since the making of the grant, and then adds:

> "*We think, therefore, that the Railroad Company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition of them whatever, or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the railroad.*
>
> "*If Congress does not make such provision, the defendants may apply to the District Court within a reasonable time, not less than six months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the Court in its discretion may modify the decree accordingly.*"

The language cited from the opinion furnishes the only mandate to the District Court as to the decree to be entered.

POINT II.

The decree contains provisions which are not within the mandate of the Supreme Court, and which the Court had no jurisdiction to decide or include.

I. The first of the provisions improperly inserted in the decree is the injunction included in Paragraph II:

> "And from selling any of the timber on said lands or any mineral or other deposits therein, except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon; or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

The injunction thus granted is absolute, permanent and final. There is no reservation for subsequent modification or qualification. The fourth paragraph does make provision for a modification

> "of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so."

But this is in terms limited to the injunction contained in the third paragraph of the decree, and plainly was not intended to apply to the injunction contained in the second paragraph.

The Railroad Company is thus permanently enjoined from the sale of the timber and mineral on or in all the granted lands except in conjunction with the land.

(1) This is not the decree which the Supreme Court commanded the District Court to enter. That court ordered a permanent injunction against the violations of the covenants. That is adequately provided for by the first clause of the second paragraph of the decree. To add anything to the express mandate is "to give other and further relief" than that awarded by the Supreme Court, and this the District Court is prohibited from doing by the decisions above cited.

(2) No "interpretation of the opinion" can justify this permanent injunction restraining the sale of the timber and mineral, except in conjunction with the land.

The last two paragraphs of the opinion which enjoin any disposition of the land or timber until Congress shall have a reasonable opportunity to provide by legislation for their disposition, and limiting that injunction by the condition that if Congress shall not act the defendants may apply to the District Court within a time not less than six months for a modification of this injunction, and authorizing the court to modify the decree accordingly, were plainly not intended as a permanent and final adjudication that in no instance could the timber or mineral be sold except in conjunction with the land.

The reasons which led to the qualified injunction contained in the last two paragraphs are made plain by what precedes them read in the light of the undisputed facts disclosed by the record. The learned judge who wrote the opinion had just commented upon the testimony respecting the character of the lands and summarized the result as follows:

> "It is, however, clear even from the Government's summary of the evidence, that lands which

> may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, *for our present purpose we may accept the assertion of defendants.*"

Further he adds:

> "The lands invite now more to speculation than to settlement."

The conditions disclosed by the Government's evidence lead imperatively to the conclusion that a large part of the lands are incapable of sale to *bona fide* actual settlers. Attached to the Government's brief in the Supreme Court is an exhibit entitled a "Reduced Statement of Testimony as to the Character of Granted Lands," one column of which details "the percentage of land suitable for tillage when cleared." From this statement it appears that the witnesses for the Government testified that of the lands with respect to which they were examined upwards of a million acres were found to be not suitable for tillage when cleared. Some of the witnesses testified respecting the same lands, but making adequate allowance for this, the testimony for the Government unquestionably shows that a very large proportion of the land remaining unsold is not suitable for tillage when cleared. It appears further from another column of this statement that in the four counties of Lane, Douglas, Josephine and Jackson alone there are about 400,000 acres of land which, according to the testimony of the witnesses for the Government, are not suitable for settlement in tracts of a quarter section. These are facts which the Court could not and did not disregard. From them it follows that a large proportion of the granted lands remaining unsold can never be sold by the Railroad Company in honest compliance with the covenants as construed by the Supreme Court. These lands must then forever remain in mortmain unless relief is afforded by Congress.

It is not open to the Government to contradict this statement of fact. To assume that the Supreme Court did not find this to be the fact, would not only contradict the express language of the opinion, but would imply that that court did not give effect to an obvious feature essential to the right determination of the controversy. The defendants had taken a large volume of testimony respecting the character of the lands for the purpose of showing that to a large extent it was not susceptible of actual settlement. This evidence was presented to the District Court. The judge declined to consider it, regarding it as immaterial because the provisos, being in his opinion conditions subsequent, any sale of the lands in violation of the provisos was ground of forfeiture.

The Circuit Court of Appeals did not consider this evidence. It certified the case up to the Supreme Court. When the Supreme Court held that the provisos were not conditions subsequent, but were covenants, the question of fact as to the character of the lands became a *vital fact* in the case. Whether a court of equity should restrain the sale of all the lands to any person other than an actual settler and thus in effect issue a mandatory injunction compelling the sale of all the lands whether capable of settlement or not to an actual settler, whether it would enjoin the sale of the timber on all the land, necessarily required a consideration of the character of the land, and the Court could not proceed to the granting of such an injunction while the question remained totally undetermined. Recognizing this the Supreme Court said: "*For our present purpose we may accept the assertion of defendants.*" What is the assertion of the defendants? The Court had cited it just before. It was:

> "That the lands capable of actual settlement and the establishment of homes thereon at no time 'exceeded (approximately) 300,000 acres, consisting of

> small and widely separated tracts, all of which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser at prices not exceeding $2.50 per acre'" (p. 158).

It must be assumed then that in directing the injunction the Court was acting upon the conceded fact that a large proportion of the lands remaining unsold are incapable of actual settlement, *and that as a consequence it was in effect granting an injunction against selling such lands at all.*

This, we say, is the necessary result of the construction placed upon the provisos. This is not the result of changed conditions or of the conduct of the Railroad Company. It always was so and always must remain so, because it is a physical fact, and lands of this character must therefore remain unsold unless the provisos are modified by the action of Congress, "having due regard for the rights of said California & Oregon Railroad Companies" (14 Stat. 239).

The question then arises as to the timber on these quarter sections. Must that remain forever unsold? Because the Railroad Company cannot sell the land, does it follow that it cannot sell the timber? We think plainly not. The Supreme Court has held that:

> "There was a complete and absolute grant to the Railroad Company with power to sell limited only as prescribed, and we agree with the Government that the Company 'might choose the actual settler, might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60 or 100 acres or any amount not exceeding 160 acres', and we add it might choose the time for selling or its use of the grants as a means of credit subject ultimately to the restrictions imposed."

The grant of the land carried with it the title to the timber. Apart from the provisos, the Railroad Company had an undoubted right to cut and dispose of the timber. It may be conceded for the purposes of the present argument that the provisos restricted that right so far as interference with the timber might prejudice the sale of the lands to actual settlers or their enjoyment by actual settlers, but it restricted it no further. The ownership of the timber was absolute in the Railroad Company, except as that ownership was inconsistent with the duty of the Company to sell the lands to actual settlers. If there was no such duty, the title to the timber was necessarily absolute. In the case of lands incapable of actual settlement, there could be no such obligation, and hence, the right to the disposition of the timber upon such lands was necessarily absolute in the Company. Upon the concession as to the facts, it necessarily followed that as to a large proportion of the unsold lands, the restrictive covenant could not limit or affect the title of the Railroad Company to the timber on such lands, because they were incapable of sale to an actual settler. The Supreme Court was not inattentive to this situation, nor to the situation respecting other lands than those which were not susceptible of sale to an actual settler. Some of the land, although carrying merchantable timber, is susceptible of cultivation. In many instances, however, the timber is much more valuable than the land. The record shows that there are some quarter sections the timber upon which is worth $60,000. To sell this land to an actual settler for $2.50 an acre would be to enrich the purchaser without any commensurate return to the Government or to the Railroad Company. It might lead also to other serious abuses. The Railroad Company having the selection of purchasers, would be at liberty to sell valuable tracts to favorites at this grossly inadequate figure.

But a sale of a portion of the timber on these lands might not be inconsistent with a sale of the land to actual settlers in analogy with a well-understood rule respecting waste in cutting timber.

30 A. & E. Ency. Title Waste, p. 242.

In order to permit Congress or the parties to find some method by which practical conditions could be made to harmonize with legal rights, and for the mutual benefit of the Railroad Company and the Government, the Court suggested a stay of proceedings to afford a time for such action. But further than that, the Court did not go.

(3) The decree as entered attempts to determine the rights of the Railroad Company in the timber on the lands by permanently enjoining the Railroad Company from making sales of it, except to actual settlers.

The District Court had no jurisdiction to make such decision because, as we have seen, the Supreme Court had not so decided. But further, the Supreme Court would have had no jurisdiction to make such decision if it had attempted to do so. As we have seen, it had held that the title to the lands in the Railroad Company was absolute and complete subject to the restriction. It is also held that the restriction applied to all the lands.

In answer to the contention that the limitation applied only to lands capable of actual settlement, the Court said:

> "But neither the provisos nor the other parts of the granting act make a distinction between the lands, and we are unable to do so. The language of the grant and of the limitations upon them is general. We cannot attach exceptions to it."

Again:

> "The character of the lands furnishes no excuse (for selling to persons other than actual settlers).

> *It might have justified non-action*, but it did not justify antagonistic action."

Again:

> "Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress *to relax the law*. They were neither cause nor justification for violating it."

It may not well be doubted that this determination was within the issues made by the pleadings. But the further question as to a disposition of the timber upon lands not susceptible of sale to a *bona fide* actual settler for settlement was not within the issue presented by the pleadings nor open to determination by the District Court, or by the Supreme Court upon appeal. That was a question entirely distinct from the issue presented. The Supreme Court, therefore, did not attempt to determine it, but contented itself by affording an opportunity for action by Congress or the parties.

It is, we submit, manifest from the whole scope of the bill of complaint and answers that the right to the disposition of the timber on quarter sections not susceptible of sale to actual settlers, was not an issue in this case. The bill proceeded upon the assumption that all the lands were capable of settlement. It made no distinction in the character of the land. It presented no question as to the rights of the parties to the timber on any particular description of lands. It did not challenge the right of the Railroad Company to remove the timber in whole or in part, either in aid of the sale of the land to actual settlers or in the case of the impossibility of sale of particular lands to an actual settler. The Court below did not attempt to pass judgment upon that question. It distinctly refused to consider the evidence upon which such issue, if presented, could have been determined. That being so, the Court

has not now the power, without trial of the issue, to grant a permanent and final injunction restraining the defendants from selling the timber except in conjunction with the land, which is in effect a final judgment upon an undetermined issue.

Windsor v. *McVeigh*, 93 U. S. 274.
Reynolds v. *Stockton*, 140 U. S. 254.

In the case first cited, the Court said:

> "All courts, even the highest, are more or less limited in their jurisdiction. * * * Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand the court notwithstanding its complete jurisdiction over the subject and parties has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract, If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

II. The decree departs from the mandate in the third paragraph in several particulars.

(a) It does not follow the language of the opinion respecting the disposition of the land or timber and includes in the injunction mineral or other deposits as to which nothing is said in the opinion.

(b) It enjoins the defendants

> "from disposing of, receiving or exerting any control over any money which arose or which may hereafter arise from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise and now on deposit with any bank, Clerk of Court or other institution or person to await final decision of the United States Supreme Court in this case until Congress shall have a reasonable opportunity to make provision by legislation for the disposition thereof, etc."

This takes from the defendants the right to receive, control and enjoy, money as to which nothing whatsoever is said in the opinion of the Supreme Court. The fourth paragraph permits the defendants to apply to the Court for a modification of the injunction, and the Court "reserves the right to modify this decree in that regard if in its opinion good cause shall then exist for doing so." It does not appear from the record or otherwise that the defendants' right to the money so impounded was a matter in issue in this cause. If for any reason not disclosed by the record the possession of this fund should be tied up for a time, one would expect that upon the termination of the period the decree would provide that the rights of the parties therein should be determined according to law. By this decree the control of the money and, therefore, in effect its ownership, is adjudged presumptively against the defendants without hearing, and they are left merely the liberty to apply to recover it back.

III. We transcribe the third and fourth paragraphs of the decree for convenience of reference:

> "3. That the defendants and their respective officers and agents be, and each is hereby, enjoined from making or agreeing to make, either directly or

indirectly, any disposition whatsoever of said lands or any part thereof, or of the timber thereon or any part thereof, or of any mineral or other deposits therein; from cutting, removing, or authorizing the cutting or removal of the timber thereon or any part thereof; from removing or authorizing the removal of mineral or other deposits therein; and from disposing of, receiving or exerting any control over any money which arose, or may hereafter arise, from said lands, either through sales thereof or of timber thereon, or through condemnation proceedings or otherwise, and now on deposit, or which may hereafter be placed on deposit, with any bank, clerk of court, or other institution or person, to await the final decision of the Supreme Court of the United States in this case, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, money, mineral, or other deposits, in accordance with such policy as Congress may deem fitting, under the circumstances, and at the same time secure to the defendants all the value that the said granting acts conferred upon the grantees.

4. That if Congress does not make provision for the disposition as aforesaid of said lands, money, timber, mineral or other deposits, the defendants may apply to the court within a reasonable time, but not less than six months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of the said lands, timber, money, mineral or other deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard if, in its opinion, good cause shall then exist for doing so."

By the third paragraph the Railroad Company in effect is divested of the title to the land and the timber thereon and the mineral therein. It is enjoined from exercising any

act of ownership. The title remains divested until action is taken as hereafter stated. By the third paragraph this divestiture continues until Congress shall have a reasonable opportunity to make provision by legislation, etc. By the fourth paragraph it is provided that if Congress shall not make provision for the disposition of the land, etc., the defendant may apply for a modification of the injunction contained in the third paragraph, and the court reserves the right to modify the decree in that regard if in its opinion, good cause shall then exist for so doing.

As we understand it, this is not within the mandate of the Supreme Court. The Supreme Court suspended the disposition of the land and timber until Congress should have an opportunity to legislate, but if Congress did not choose to legislate within the time limited, the Court did not intend to give the District Court discretion to continue the injunction indefinitely, because that would be in effect to make the rights of the parties depend not upon the law of the land, but upon the discretion of the judge in terminating or continuing the injunction. The Railroad Company had the right to sell to actual settlers such land as it could sell to actual settlers, and the Supreme Court certainly did not intend to divest the Railroad Company of this right and substitute for it the right to sell subject to the discretion of the District Court.

The Supreme Court had not decided that the Railroad Company could make no disposition of the timber upon the sections of the land which were not susceptible of sale to actual settlers. As we have already argued, it was not within the jurisdiction of any of the courts before which this cause had been pending, to make such a decision.

When the language of the opinion is compared with the language of the decree, it will be seen that the discretion which the Supreme Court intended the District Court

should exercise, was not at all a discretion as to *rights,* but solely a discretion in arranging details essential to the protection of those rights, when the proposed stay should terminate.

In brief, the contention of this defendant (and it speaks solely for itself) is that the grant to the Railroad Company having been adjudged absolute with a power of sale upon the terms of the provisos, no Court has jurisdiction to suspend the exercise of this unquestioned right (or of the judgment of a court, except by statutory authority), much less to make the exercise of that right conditional upon obtaining from the District Court an order permitting its exercise; that if the defendant had the right to cut and sell the timber, no Court had jurisdiction to suspend the exercise of that right or to make it conditional upon obtaining an order of the District Court; the question whether the Railroad Company has the right to sell the timber on lands not susceptible to sale to actual settlers, was not in issue in this case and the Court has not decided and could not decide that question. Therefore, it was without jurisdiction to prohibit the sale of the timber on such lands.

While the sale of this land and timber is suspended, taxes are accumulating on the basis of the value of the lands as timbered, and these taxes are a lien prior to the lien of this defendant. If a considerable part of the lands can never be sold and if the timber upon them can never be sold, the defendant's security on the land will gradually disappear.

Whatever power Congress may have, under the reserved right to amend or repeal the granting act, no one has supposed that that power is vested in the Courts.

IV. The decree awards costs against the Union Trust Company of New York, individually and as trustee, and the costs have been taxed at $6,249.02. The mandate of the Supreme Court is silent with regard to costs. Assuming that the District Court had power to award costs in its discretion, we submit that the awarding of costs against the Union Trust Company of New York, individually and as trustee, was not equitable.

The grant was made in 1866. On July 1st, 1887, the Railroad Company, being in the hands of a receiver, and the road constructed only in part, the bondholders represented by the Union Trust Company of New York advanced the sum of $20,000,000 to accomplish the primary purpose of the Government in the construction of the road. The money was applied to that purpose and the road was completed. The money was advanced upon the security of the lands granted. The road having been constructed and the Government having secured the end which it sought to attain, this suit was brought and in it the Government undertook to take from the bondholders the security upon which they had advanced the money, there then remaining unpaid the sum of upwards of $17,000,000. The Government based its claim to deprive the bondholders of this security upon the ground that the grant had been forfeited by a breach of condition subsequent. The Union Trust Company of New York, as trustee for the bondholders, was made a party defendant. It had no alternative except to resist this unwarranted claim. To have failed to do so would have been a distinct breach of trust. It was successful in reversing the judgment of the Court below and in securing the granted lands for the bondholders, subject to the provisos which, however, the Court construed less favorably to the bondholders than the trustee had urged. Neither in the bill of complaint nor in the proofs nor in the

argument of counsel has it been suggested that defendant was guilty of any wrongful act for which it should be visited by the infliction of costs. No reason has been assigned by the Court for the imposition of costs upon this defendant, and we submit that the action of the Court in this respect was erroneous.

Higgins v. *Eaton*, 204 Fed. 273.

POINT III.

The decree as entered should be modified by striking out the last part of the second paragraph beginning with the words "and from selling" and by striking out the whole of paragraphs three and four and so much of paragraph seven as awards costs against the defendant Union Trust Company of New York, individually and as trustee.

Dated, New York City, April 18, 1916.

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